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CASES CITED.

STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

OTTO H. KAHN AND HENRI P. WERTHEIM VAN HEUKELOM, as executors of the last will and testament of Abraham Wolff, deceased, appellants.
v.
THE UNITED STATES.

No. 52.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the Court of Claims dismissing appellants' petition (R. 52) for the recovery of $58,885.86, taxes collected by the collector of internal revenue for the fifth district of New Jersey under the provisions of section 29 of the act of June 13, 1898 (30 Stat. 448, 464-465), upon the right to inherit certain legacies created in the last will and testament of Abraham Wolff, deceased, who died a resident of the State of New Jersey on October 1, 1900. (R. 38). The legacies involved are life

interests in certain trust funds which appellants contend were contingent beneficial interests which had not vested in possession or enjoyment prior to July 1, 1902, within the meaning of the refunding act of June 27, 1902.

The decedent's last will and testament was admitted to probate and record on November 7, 1900, and the same day letters testamentary were granted to appellants. (R. 38.) Pursuant to an order dated November 7, 1900, of the State court of New Jersey having jurisdiction of the matter the executors, beginning with said date, published notice to creditors to present claims against said estate within nine months thereafter (R. 42), and by a later order, dated August 8, 1901, of the same court the presenting of claims was declared barred (R. 42).

The decedent left a large personal estate amounting to several millions of dollars. (R. 39.) Bequests which are here involved were made chiefly to nieces and nephews, the residuary estate being left in equal shares to the testator's two daughters. (R. 39, 40.)

The will of Abraham Wolff (R. 18–37) provided in the twenty-fifth paragraph thereof (R. 27):

> The gifts, legacies, and devises made and bequeathed in and by the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second twenty-third, twenty-fourth, and twenty-

seventh articles of this my will are to be paid free of any inheritance, succession, or other similar tax, and I hereby direct such tax to be borne by my estate.

All the legatees whose legacies are here involved received income therefrom prior to July 1, 1902 (R. 39). The following list gives the names of these legatees, and the amount which each legatee received *prior to said date* (R. 40):

Beneficiary.	Monthly rate.	Total.
Flora Wolff, niece	$120.00	$2,520.00
Matilda Steinman, niece	150.00	3,150.00
Nellie Morris, niece	125.00	2,625.00
Louis S. Myer, nephew	65.00	1,365.00
Alfred E. Frank, nephew	65.00	1,365.00
Rosa Keiffer, niece	180.00	3,780.00
Fanny Elson, niece	150.00	3,150.00
Babette Myer, sister	150.00	3,150.00
Athalie Frank, sister	.....	825.00
Carrie Rauch, niece	160.00	3,360.00
Benjamin Frank, nephew	65.00	1,365.00
Tillie Lehrburger, niece	160.00	3,360.00
Lottie Elson, sister	375.00	7,875.00
Nanette Jacobs, niece	125.00	2,625.00
Celia Loeb, niece	125.00	2,625.00
Total	.....	43,140.00

Prior to July 1, 1902, Addie W. Kahn, one of the two residuary legatees, was paid by the executors out of the income of the estate various sums each month from January, 1901, to June, 1902, both inclusive, aggregating from the personal estate $307,488.77 and from income from real estate $23,274.56, a total of $330,763.33.

Prior to July 1, 1902, Clara W. Wertheim, one of the two residuary legatees, was paid by the executors

out of the income of the estate various sums each month from January, 1901, to June, 1902, both inclusive, aggregating from the personal estate $307,488.73 and from income from real estate $25,274.56, a total of $330,763.29. (R. 40.)

The executors, appellants herein, on or about April 27, 1903, made a return of said decedent's personal estate for assessment of tax, giving a schedule of the legacies arising therefrom, the value thereof, and the amount of the tax which had accrued thereon. On or about November 4, 1903, the said executors paid the taxes assessed in respect to each legacy considered taxable, the aggregate amount of said taxes being the sum of $107,398.16. (R. 14.) Subsequently, upon claims for refund and as the result of a suit against the collector, taxes which had been collected in respect of certain legacies were refunded, leaving an unrefunded balance of $58,885.86. (R. 17.) As the United States contends that the claim for refund embodied in this action was never presented to the Commissioner of Internal Revenue in the manner nor within the time required by law, the claims for refund which were presented are particularly referred to.

1. Otto H. Kahn, one of the executors herein, on or about April 4, 1904, presented a claim in the sum of $26,637.59 for the refund of a portion of the tax collected, upon the ground that certain sums had been included as assets which were not assets of the decedent's estate, and that the residuary legacies had, accordingly, been erroneously increased in

value, and that the tax thereon was, therefore, excessive in amount. (R. 43.) This claim was allowed in part and the petitioners were paid the sum of $13,983.36. (R. 44.)

2. On or about May 15, 1905, Otto H. Kahn and others, as trustees under the will, presented to the Commissioner of Internal Revenue a claim for the refund of $37,673.13, upon the ground that in assessing the tax which had been collected upon the life interest of Clara W. Wertheim in one-half the residuary estate, the value thereof had been calculated by mortuary tables upon said legatee's expectancy of life, whereas she had died on August 15, 1903. It was contended that the tax upon her interest should have been calculated only for the actual period of her life following decedent's death. (R. 44.) This claim was rejected, and the executors brought an action in the United States Circuit Court for the District of New Jersey against the collector of internal revenue, to whom the tax had been paid. The plaintiffs were successful in this action and were awarded judgment for the amount claimed with interest. (R. 45.)

3. On or about June 6, 1911, Mortimer L. Schiff, as trustee under the will of said decedent, presented to the Commissioner of Internal Revenue a claim for the refund to the trustees of the sum of $44,305.72, in which it was stated that the various beneficiaries of life interests in the trust funds had received certain amounts of income therefrom prior to July 1, 1902, and that the tax should only have been collected

with respect to the amounts which the legatees had actually received. It was claimed that the balance of the tax collected with respect to the value of the said life interests in the whole amount of each trust fund should be refunded as a tax upon contingent beneficial interests which had not vested in possession or enjoyment prior to July 1, 1902. This claim was rejected. (R. 45.)

4. On November 23, 1915, Otto H. Kahn, as "executor of the last will of Abraham Wolff, deceased," through his attorney, filed with the collector of internal revenue for the fifth district of New Jersey, a claim for refund of $59,711.61, which claim was transmitted to the Commissioner of Internal Revenue. This claim recited the allowance and repayment of $13,983.36 and of $33,703.19 and claimed the difference between the sum of the above amounts and $107,398.16, the total tax paid. The claim for refund was based on the ground that the tax was assessed on legacies which had not vested in possession or enjoyment prior to July 1, 1902. This claim was rejected by the Commissioner of Internal Revenue on August 14, 1916. (R. 46.) This is the first time this identical claim was ever made.

The petition for the recovery of $58,885.86 was filed in the Court of Claims on July 2, 1917. (R. 1.)

QUESTIONS INVOLVED.

1. Was the tax, the refund of which is now sought, assessed upon contingent beneficial interests not vested in possession or enjoyment prior to July 1,

1902, within the meaning of the act of June 27, 1902 (30 Stat. 406)?

2. Was the identical claim upon which this action is based presented to the Commissioner of Internal Revenue prior to January 1, 1914, as provided by the act of July 27, 1912 (37 Stat. 240)?

ARGUMENT.

I.

Was the tax, the refund of which is now sought, assessed upon contingent beneficial interests not vested in possession or enjoyment prior to July 1, 1902, within the meaning of the act of June 27, 1902 (30 Stat. 406)?

This tax was assessed under the provision of the act of June 13, 1898, ch. 448 (30 Stat. 448, 464-465). Sections 29 and 30 of said act, so far as the same are material to this case, are as follows:

> SEC. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the interstate laws of any State or Territory, or any personal property or interest therein transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or per-

sons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say * * *.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share * * *.

Section 30, supra, was amended by section 11 of the act of March 2, 1901, to read: "That the tax or duty aforesaid shall *be due and payable in one year after the death of the testator and shall* be a lien and charge upon the property of every person who may die, as aforesaid, for twenty years * * *."

The executors of the will, appellants herein, contended that the tax assessed upon the respective legacies or distributive shares under the said will should be refunded to them under the provisions of section 3 of the act of June 27, 1902, ch. 1160 (32 Stat. 406), because it is asserted that said legacies or distributive shares were contingent only and had not become

vested prior to July 1, 1902. Section 3 of said act provides:

> SEC. 3. That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June thirteenth, eighteen hundred and ninety-eight, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. * * *

It has been held that a tax imposed by section 29 of the act of June 13, 1898, is a tax on the right of transmission of property. In *United States* v. *Perkins* (163 U. S. 625–628) it was said: "The tax is not upon the property in the ordinary sense of the term but upon the right to dispose of it," and in *Knowlton* v. *Moore* (178 U. S. 41, 56) the court said: "Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the *transmission from the dead to the living*, on which such taxes are

more immediately rested." (*United States* v. *Jones*, 236 U. S. 106–111.)

The tax being on the right to transmit and on the right of the legatee to receive the property transmitted, when the right to a particluar interest became fixed or accrued it became subject to the tax imposed by the statute. When the beneficiary had the *right to demand payment* of his legacy, then the liability to the tax arose. (*Knowlton* v. *Moore*, 178 U. S. 41–56; *Hertz* v. *Woodman*, 218 U. S. 205; *United States* v. *Fidelity Trust Company*, 222 U. S. 158; *United States* v. *Jones*, 236 U. S. 106; *Simpson* v. *United States*, 252 U. S. 547–551.)

Did the legatees have a right, prior to July 1, 1902, to the possession or enjoyment of the legacies under the will, and did they enter into the enjoyment thereof prior to that date?

In its findings of fact the Court of Claims (R. 42) found that the values of the legacies were ascertainable before July 1, 1902; that no pending controversy could affect the value of any but the residuary legacies; and that there was no reason shown why these trusts could not have been set up before July 1, 1902.

The laws of the State of New Jersey in force during the period of the administration of this estate provided that the executor under a will shall state and settle his account in the surrogate's office within one year after his appointment, unless the court for some good cause shown should extend the time (Comp. Stat. N. J., 1910, vol. 3, sec. 114); that in case of an executor's failure to so settle his account, any person

interested in the estate may cite him to make such settlement at the ensuing term (Id. sec. 116); and that, if no time is fixed in a will for the payment of legacies therein created, the executor has one year after probate in which to pay them. Legatees may maintain action against an executor for the payment of legacies after the expiration of one year. (Id. sec. 1.) It is also provided by the New Jersey statutes that the orphans' court, or surrogate of the proper county, is authorized to give public notice to creditors to present their debts, and that after the expiration of the time in such order limited the orphans' court, or the surrogate of the proper county, may, by final decree, order that all creditors who have not brought in their claims within the time in said order directed shall be barred from any action therefor against the executor. (R. 41.)

On November 7, 1900, public notice was given by the executors to all persons having claims against the estate, to present the same on or before August 7, 1901. (R. 42.) On August 8, 1901, the surrogate issued an order, in part, as follows: "It is ordered that all creditors of said estate who have neglected to bring in their claims and demands against said estate within the time so limited, be forever barred from their action therefor against the executors of said decedent." (R. 42.) It was possible, therefore, prior to July 1, 1902, to ascertain the present value of the legacies created under the will, and it was the statutory duty of the executors to do so within one year from the date of appointment.

Where the law of the State in which the estate is being administered provides that the executors must settle the estate or pay the legacies under the will within a specified time, the legatees have a right to possession or enjoyment of their legacies on and after the date specified, and the beneficial interests in the estate thereupon become vested. (*Simpson* v. *United States*, 252 U. S. 547–552.)

The several legatees enjoyed the income from the estate for twenty-one months prior to July 1, 1902. (R. 39, Par. IV.)

As to life interests, it was proper for the collector of customs in assessing the taxes, to use mortuary tables to ascertain the present worth of said interests. (*Simpson* v. *United States*, 252 U. S. 547–550.)

The entire clear value of the legacies could have been ascertained and shown prior to July 1, 1902. The legatees had a right to demand possession of their beneficial interests under the will prior to that date, and they did actually enter into the enjoyment of the income from such legacies. Under the decisions of this court, the interests created by the will became "vested in possession or enjoyment," prior to July 1, 1902.

In *Simpson* v. *United States*, *supra*, the court had under consideration questions similar to those involved in the present case. In that case, the decedent by will directed his executors to convert a large residuary estate into money, to divide the same into three equal shares, and to transfer two of such shares to a trustee, to be selected by them, in

trust to invest a nd reinvest, and to pay to each of his two daughters the whole of the net income of one share so long as she should live. This court held:

> The contention is that the excess of the assessment above the amount which had been actually paid to the trustee prior to July 1, 1902, had not become vested prior to that date, within the meaning of the act of June 27, 1902 (32 Stat. 406, par. 3), and that it should therefore be refunded.
>
> The law of New York, in force when the estate was in process of administration, provided (New York Code of Civil Procedure, 1899, par. 2721) that "after the expiration of one year (from the time of granting letters testamentary) the executors * * * must discharge the specific legacies bequeathed by the will and pay general legacies, if there be assets," and paragraph 2722 gave to legatees the right to petition in an appropriate court to compel payment of their legacies after the expiration of such year.
>
> Letters testamentary were granted to the appellants on June 30, 1899, and we have seen that assets abundantly sufficient to have increased the trust fund legacies of the daughters much beyond the amount at which they were assessed for taxation were in the custody of the executors prior to July 1, 1902, and therefore under this law of New York it was their duty to have made such payments prior to that date unless cause was shown for not so doing. * * *

It is thus apparent that for many months prior to July 1, 1902, there were abundant assets with which to make payments upon these two legacies, in an amount larger than was necessary to make them equal to, and greater than, that for which they were assessed for taxation; that for many months before that date it was the legal duty of the executors to make such payment; and that for a like time the legatees had a statutory right to institute suit to compel payment.

It is obvious that legacies which it was thus the legal duty of the executors to pay before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment, within the meaning of the act of June 27, 1902, as it was interpreted in *United States* v. *Fidelity Trust Co.* (222 U. S. 158), *McCoach* v. *Pratt* (236 U. S. 562, 567), and in *Henry* v. *United States* (251 U. S. 393). The case would be one for an increased assessment, rather than for a refund, if the war revenue act had not been repealed.

In *United States* v. *Fidelity Trust Company* (222 U. S. 158) this court held that a legacy to a trustee, in trust to hold the fund and pay over the net income to the testator's niece in quarterly payments during the period of her natural life, on which the legatee received several payments of income, is not a contingent beneficial interest, but a vested life estate and subject to the tax imposed by act of June 13, 1898, and that taxes paid on the value of such legacy

can not be recovered under the provisions of section 3 of the act of June 27, 1902, supra.

To the same effect is the decision of the circuit court of appeals, eighth circuit, in *Westhus* v. *Union Trust Company* (164 Fed. 795), where the court said:

> So far as the case holds that the tax is not imposed until the estate vests in possession or enjoyment, we are in entire accord with it, but we think there are serious objections to the position that such circumstances as those mentioned arising during the course of administration postpone the vesting in enjoyment contemplated by the statute. The express provision in the amendatory act of 1901 that the tax "shall be due and payable in one year after the death of the testator" would in itself indicate a contrary intent, at least as respects estates passing by will, and we do not doubt the principle of the provision would also apply to those passing from intestates. Nor do we think there is anything in the statute indicating that an assessment or any other affirmative act by the collector is a necessary prerequisite to the imposition of the tax and the creation of the lien upon the estate of the decedent. When the successor is entitled to the beneficial enjoyment of the estate, though he has it not in possession, the law at once imposes the tax. The ascertainment of the precise amount in dollars and cents is a detail of administration which makes certain the charge previously fixed by law upon the estate.

To the same effect also is the decision of the Circuit Court of Appeals, Eighth Circuit, in *Chauteau* v. *Allen* (170 Fed. 412).

In *Title Guarantee & Trust Company* v. *Ward* (184 Fed. 447), the facts were as follows: The testator died March 3, 1901, and the tax was assessed on September 1, 1902, after the act of June 27, 1902, became effective. The Circuit Court of Appeals, Second Circuit, said (p. 449):

> Plaintiffs contend that this tax was not "imposed" within the meaning of the act of 1902 until it was levied and assessed on September 1, 1902, and that therefore the tax is not within the saving clause of the repealing act. This contention has been disposed of adversely by this court in *Eidman* v. *Tilghman* (136 Fed. 141, 69 C. C. A. 139) and by the Supreme Court in *Hertz* v. *Woodman* (opinion filed July 1, 1910) (218 U. S. 205, 30 Sup. Ct. 621, 54 L. Ed. 1001). This point is here referred to because it is not specifically disposed of in the exhaustive opinion of Judge Ray.
>
> With the views expressed in that opinion we fully concur. The present case is readily differentiated from those relied upon by plaintiffs in the circumstance that the children of this testator are given their respective shares absolutely. They and they only have power to dispose, each of her share, having that power over the corpus, and in the meantime the enjoyment of the income. They may fairly be held to have each a vested estate of which she

> has the enjoyment. We are not persuaded by the argument that the statute requires both possession *and* enjoyment as essential to liability for the tax.

A similar decision is that of *Beer* v. *Moffatt* (192 Fed. 984).

If beneficial interests in an estate are contingent until distributable under the laws of the State of administration, as was held in *Farrell* v. *United States* (167 Fed. 639), then the converse must be true, that when such interests are distributable under the laws of the State they are no longer contingent, but become vested interests.

The decision of this court in *United States* v. *Jones* (236 U. S. 106) is not adverse to the contention of the United States in the present case. In that case this court held that the beneficial interests were contingent for the reason that the period of administration had not been terminated, the intestate's death having occurred on June 28, 1902, but three days before the repealing act took effect. No administrator had been appointed at that time, and it could not be determined what, if anything, would remain after payment of debts. The distributive shares, therefore, were not ascertainable prior to July 1, 1902. Had the period of administration been completed, however, and the period provided by the State law for settlement of the estate expired (as in the case now before this court), it is believed that the decision would have been in favor of the Gov-

ernment's contention. This inference is drawn from the excerpt of the opinion quoted below (page 112):

> So, in the practical sense, their interests are contingent and uncertain until in due course of administration it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly can not be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property.

Appellants rely upon the decision in the case of *United States* v. *Jones, supra,* to support their claim that the several beneficial interests on which taxes were imposed in the instant case had not become vested, but were still contingent on July 1, 1902.

The above case, and the one now before the court are easily distinguishable, however, as indicated by the facts hereinbefore referred to.

Nor is the case of *McCoach* v. *Pratt* (236 U. S. 562), relied on by appellants, in point. The law of Pennsylvania, under which the estate was being administered, provided that creditors had a year within which to file their claims. The beneficial interests of the legatees were not, therefore, ascertainable until the expiration of the statutory period of administration, and that period did not expire until long after the war revenue act of June 13, 1898, had been repealed. The interests of the legatees were contingent on July 1, 1902, and this court so held.

It is contended that the clear value of all of the beneficial interests or legacies involved in this case were ascertainable before July 1, 1902. The value

of the estate was known or ascertainable before that date. It was the statutory duty of the executors to make a final account and to turn over the residue of the estate to the trustees prior to July 1, 1902. It is also contended that the several legatees under the will entered into the enjoyment, if not into the actual possession, of their several legacies, and that, therefore, such legacies were vested in them, and were not on July 1, 1902, contingent. This contention is supported by the decisions of this court in the following cases: *Hertz* v. *Woodman* (218 U. S. 205, 224); *United States* v. *Fidelity Trust Company* (222 U. S. 158); *Simpson* v. *United States* (252 U. S. 547).

II.

Was the identical claim upon which this action is based presented to the Commissioner of Internal Revenue prior to January 1, 1914, as provided for by the act of July 27, 1912 (37 Stat. 240)?

In order that a suit may be maintained in the Court of Claims or in any other court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed, a claim for the amount sued for must first have been submitted to the Commissioner of Internal Revenue and the commissioner's decision in reference to the legality of the claim obtained. If no decision is rendered by the commissioner within six months from the time the claim is made, suit may be brought thereon, if brought within the limitations prescribed by section 3227, R. S. (R. S. 3226).

Sections 3226 and 3227 R. S., in so far as they are material in this case, are quoted below:

> SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of (the) Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had thereon: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section.
>
> SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought *within two years next after the cause of action accrued.*

The act of July 27, 1912 (37 Stat. 240), however, extended the time within which claims for the refunding of taxes alleged to have been erroneously

or illegally collected might be filed, to January 1, 1914. Section 1 of said act, upon which the appellants rely to give life to their claim, reads as follows:

> That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of sections twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act, may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

The second question considered by the Court of Claims, and now before this court for review, was whether the claim made the basis of this action was filed in compliance with the provisions of the above-quoted act.

This court has held that the act of July 27, 1912, raised the bar contained in sections 3226 and 3227, R. S., to the time for filing claims for refund. (*Rand* v. *United States*, 249 U. S. 503, 508.)

It is admitted that a certain claim was filed with the Commissioner of Internal Revenue on or about June 6, 1911, by one Mortimer L. Schiff, as trustee under the will of Abraham Wolff, deceased, for $44,305.72, claiming a refund of that sum as taxes erroneously and illegally collected by the collector of internal revenue (R. 45). This claim was filed,

not by the one who paid the taxes and who had a right to receive payment of the refund, if the taxes had been erroneously and illegally collected, but by one who had nothing to do with the payment of the taxes and who, in accordance with the provisions of the twenty-fifth paragraph of the will (R. 27) had received the trust funds after all taxes had been deducted therefrom. He was not only a stranger to the tax proceeding but is a stranger to this suit.

Claims for refunds must be made in accordance with the regulations of the Secretary of the Treasury, and such regulations have the force and effect of law and will be judicially noticed by the Federal courts. (*Hastings* v. *Herold*, 184 Fed. 759, 764. *Caha* v. *United States*, 152 U. S. 211, 221.)

The regulations promulgated by the Secretary of the Treasury and enforced during the period involved herein, reads in part as follows (R. 48):

> A claim for refunding should be made in the name of the party assessed, if living; if he is dead, there should be evidence of his death and the claim should be made in the name of the executor or administrator. Certified copies of the letters of administration or letters testamentary or other similar evidence, should be annexed to the claim to show that the claimant is administrator.

It is readily apparent therefore that Mr. Schiff, as trustee under the will, was not the proper party to make a claim for a refund of a tax paid by the executor of the will. Even if the claim had been allowed, he would have had no right to receive the amount

refunded. There was not a substantial compliance with the law and the regulations of the Secretary of the Treasury, and the claim filed by Schiff can not be made the basis of a suit against the United States by the executors.

It is also readily apparent that the claim filed on November 23, 1915, in behalf of Otto H. Kahn et al., as executors, for a refund of the amount involved in this suit, was not filed within the period of limitations prescribed by the act of July 27, 1912. The only claim filed within the statutory period is the one filed on June 6, 1911, by Mortimer L. Schiff as trustee under the will. The suit commenced in the Court of Claims by Otto H. Kahn et al., as executors, can not be based upon the claim filed by Schiff in order to avoid the limitation contained in the statute. The Schiff claim was not presented by the party who had been assessed and who had paid the tax; it was not presented by the party appearing as plaintiff in this suit, and the amount claimed to have been erroneously exacted is different from the amount claimed by the executors and involved in this suit.

The party entitled to a refund of internal tax must make the claim himself or by attorney, and may not rely upon a claim presented by parties not entitled to receive payment thereof. It was so held by this court in Rand *v.* United States, *supra*, wherein this court said (p. 510):

> The act of 1912 can not be made so compliant. It had its purpose and it is not satisfied by representative or negative action; it

> requires a positive and individual assertion of claim. The condition was easy of performance, its grant a concession, and there is no room for the plea to enlarge it beyond its words. It is direct and clear and liberal enough of itself. It says to the taxpayer: Make a claim for the tax you have paid, show its illegality, and it will be repaid to you. We can not relax its requirements—certainly not on the assumption that they might have been useless if complied with.

The claim upon which this suit is really based, and the only one which can be relied on as a basis for this suit, is the one filed by the claimants for the identical amount claimed in the suit asserting the same grounds; that is to say, that the tax was wrongly and erroneously demanded and collected *from the claimants* by the collector of internal revenue. Appellants apparently recognized this fact and accordingly filed a new and different claim on November 23, 1915. This claim was filed by the attorneys for the executors, appellants herein, who had paid the tax and who demanded a refund of $59,711.61, as having been erroneously and illegally exacted from the claimants on contingent beneficial interests. (R. 46.) This claim was filed with the Commissioner of Internal Revenue more than one year and six months after the period of limitation provided for in the act of July 27, 1912, had expired. It was therefore barred by the provisions of that act. (*Rand* v. *United States*, *supra*. *Coleman* v *United States*, 250 U. S. 30.)

In *Coleman* v. *United States, supra,* the tax had been demanded and paid under the act of June 13, 1898, on certain distributive shares of the estate of Coleman, who died prior to July 1, 1902. However, the year allowed for the settlement of the estate had not expired nor had the debts been paid prior to that date. On March 17, 1914, the claimant filed his claim for a refund of tax on the ground that it had been assessed on a contingent beneficial interest and therefore erroneously and illegally exacted. The application for a refund was refused and the claimants brought suit in the Court of Claims. That court held that the claim was barred by the act of July 27, 1912, and dismissed the petition. On appeal to this court the judgment of the Court of Claims was affirmed. The court said (p. 32):

> The present tax had not been collected when the act of June 27, 1902, was passed, but was collected afterwards contrary to its terms. There was little bounty in its application to such a case. No argument can make it plainer than do the words themselves that the act of 1912 applies to the present claim, and that it was presented too late.

The decision in the Coleman case is applicable to the facts found by the Court of Claims in the instant case, and is therefore controlling.

Appellants rely upon the decision of this court in *Sage* v. *United States* (250 U. S. 33). The facts under consideration in that case differ materially from the facts in this and the decision has no application to

the instant case. In this connection it may be proper to invite attention to the fact that the Coleman case and the Sage case were submitted on the same day and the decisions in both cases rendered by Mr. Justice Holmes on May 19, 1919. The Court of Claims had dismissed the petition in both cases and, as the judgment of the Court of Claims was affirmed in the Coleman case and reversed in the Sage case, and as the decision in the Coleman case is so applicable to the facts in the instant case, it is apparent that the decision in the Sage case can have no application to the case now under consideration.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims, denying recovery of any sum whatever and dismissing claimants' petition, should be affirmed.

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